

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO FLORES,

Defendant and Appellant.

D070125

(Super. Ct. No. SCE355998)

APPEAL from a judgment of the Superior Court of San Diego County,
Lantz Lewis, Judge. Affirmed.

Patrick Dudley, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Seth
Friedman and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and
Respondent.

I

INTRODUCTION

The trial court found Gerardo Flores guilty of unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a), hereafter Veh. Code, § 10851(a).) The court declined to find the offense was a misdemeanor under Penal Code¹ section 490.2, subdivision (a) (hereafter § 490.2(a)). Nonetheless, the court reduced the offense to a misdemeanor under section 17, subdivision (b)(3), suspended imposition of sentence, and placed Flores on summary probation for three years.

Flores appeals, contending the court erred and deprived him of equal protection of the law by failing to find the offense was a misdemeanor under section 490.2(a).² We disagree and affirm the judgment.

II

DISCUSSION³

A

Section 490.2 was enacted by the voters as part of the Safe Neighborhoods and Schools Act (Proposition 47). (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 8, p. 72.) We review the interpretation and constitutionality of the statute

¹ Further statutory references are to the Penal Code unless otherwise stated.

² The California Supreme Court is currently reviewing whether section 490.2(a) applies to violations of Vehicle Code section 10851(a) in *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793.

³ We omit a summary of the facts underlying Flores's conviction as they are not relevant to the issue raised on appeal.

de novo. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114; *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445.)

With exceptions not relevant here, section 490.2(a) provides: "*Notwithstanding Section 487 [defining some conduct constituting grand theft] or any other provision of law defining grand theft*, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor."⁴ (Italics added.)

Flores contends section 490.2(a) requires the reduction of his conviction to a misdemeanor because he interprets section 490.2(a) to apply to any theft of any property valued at \$950 or less.⁵ However, this interpretation ignores the opening clause, "[n]otwithstanding Section 487 or any other provision of law defining grand theft," which limits the application of section 490.2(a) to statutes defining grand theft. Vehicle Code section 10851(a) is not a statute defining grand theft. Rather, "[Vehicle Code] section 10851(a) 'proscribes a wide range of conduct.' [Citation.] A person can violate [Vehicle Code] section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving

⁴ Section 490.2(a) provides in full: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290."

⁵ The prosecution's trial evidence did not include evidence of the value of the vehicle at issue in this appeal. The court below assumed from the vehicle's age the vehicle was worth less than \$950.

it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).'" (*People v. Garza* (2005) 35 Cal.4th 866, 876.) Thus, section 490.2(a) does not apply to Vehicle Code section 10851(a).

The legislative history of Proposition 47 does not compel a different conclusion. In explaining Proposition 47's penalty reduction provisions, the Legislative Analyst's analysis stated Proposition 47 reduced "certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors." (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.) The analysis then specifically identified the affected crimes as: grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession. (*Ibid.*) The analysis did not identify unlawful taking or driving a vehicle as an affected crime. (*People v. Saucedo* (2016) 3 Cal.App.5th 635, 648, review granted Nov. 30, 2016, S237975; *People v. Johnston* (2016) 247 Cal.App.4th 252, 258, review granted July 13, 2016, S235041.)

B

Nevertheless, Flores asserts we must interpret section 490.2(a) as applying to Vehicle Code section 10851(a) because section 490.2(a) indisputably applies to section 487, subdivision (d)(1) (hereafter § 487(d)(1)), commonly known as grand theft auto, and a violation of Vehicle Code section 10851(a) is materially indistinguishable from a violation of section 487(d)(1).⁶ In his view, a contrary interpretation would violate the

⁶ Section 487 provides: "Grand theft is theft committed in any of the following cases: [¶] ... [¶] (d) When the property taken is any of the following: [¶] (1) An automobile."

equal protection clauses of the federal and state constitutions by potentially subjecting a person to a felony under Vehicle Code section 10851(a) for the same conduct that would be a misdemeanor under section 487(d)(1).

The California Supreme Court has previously rejected this argument in closely analogous circumstances explaining, "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Thus, a defendant may not complain about being charged with a felony violation under one statute even though there is an identical statute prescribing a lesser punishment. (*Ibid.*; accord, *People v. Romo* (1975) 14 Cal.3d 189, 197 [a car thief may not complain of being subjected to disparate punishments for conduct which violates both § 487(d)(1) and Veh. Code § 10851(a)].) "[N]umerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, 'one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]' the defendant cannot make out an equal protection violation." (*People v. Wilkinson, supra*, at pp. 838–839; *People v. Saucedo, supra*, 3 Cal.App.5th at pp. 652–653; accord, *People v. Johnston, supra*, 247 Cal.App.4th at pp. 258–259.)

III

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.